

ISSUE DATE: January 24, 2000

DOCKET NO. P-421/AR-97-1544

NOTICE AND ORDER FOR HEARING REGARDING LOCAL NUMBER PORTABILITY
CHARGES

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott
Edward A. Garvey
Joel Jacobs
Marshall Johnson
LeRoy Koppendrayer

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of a Petition by US WEST
Communications, Inc. Requesting Approval of
an Alternative Regulation Plan

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NOTICE AND ORDER FOR HEARING
REGARDING LOCAL NUMBER
PORTABILITY CHARGES

PROCEDURAL HISTORY

On December 11, 1998, the Commission issued its FINAL ORDER REGARDING USWC'S ALTERNATIVE REGULATION PLAN, PURSUANT TO MINN. STAT. § 237.764, SUBD. 2 in the above-entitled matter, approving the alternative form of regulation (AFOR) plan proposed by US WEST Communications, Inc. (USWC) with a January 1, 1999, effective date. The Commission clarified its order with an ERRATUM NOTICE on December 21. USWC filed its Modified Alternative Form of Regulation Plan for the State of Minnesota on January 11, 1999, with a retroactive effective date of January 1.

On August 9, 1999, the Department of Commerce (the Department) filed a complaint alleging that USWC's end-user charge for long-term number portability (LNP) violated the AFOR Plan. On September 15, 1999, the Department amended its complaint.

On October 15, 1999, the Department and the Suburban Rate Authority (SRA) each filed comments. USWC filed a motion to dismiss.

On November 15, 1999, the Department and USWC filed reply comments. USWC moved to dismiss or for summary judgment or, in the alternative, for a contested case hearing.

The matter came before the Commission on December 21, 1999.

FINDINGS AND CONCLUSIONS

I. The Complaint

In its AFOR Plan, USWC agrees not to increase rates for “price-regulated” services above an “Initial Price” for the first two years of the plan. AFOR Plan, section IV.E.3. USWC classified “Business and Residential Local Service” and “Private Branch Exchange [PBX] Trunks” as price-regulated. AFOR Plan Appendix A, p. 1.

In March, 1999, without seeking Commission approval, USWC began charging a new LNP fee to subscribers taking business local service, residential local service, or PBX trunks.¹ The Department and the SRA allege that this practice violates USWC’s AFOR Plan. The Department asks the Commission –

- to find that USWC violated its AFOR Plan by instituting its LNP end-user charges,
- to direct USWC to stop making the charges and to refund or credit the appropriate sums back to customers with interest or, in the alternative, to reduce USWC’s intrastate rates for the next two years in an amount sufficient to offset the new LNP charges, and
- to direct USWC to file with the Commission copies of any future filings USWC makes to the FCC that may relate to its AFOR Plan.

II. Background

Congress adopted the federal Telecommunications Act of 1996 (the Act) to promote competition among providers of local telephone service, also called local exchange carriers (LECs). To this end, the Act directs LECs to provide “number portability,” or the ability for a customer to switch local service providers while retaining his telephone number.² It also delegates certain powers to the Federal Communications Commission (FCC):

The cost of establishing telecommunications number administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the [FCC].³

¹Department Petition, Exhibit 3 (USWC Filing before FCC), Tariff FCC No. 5, 2nd Revised Page 13-69.4.

²47 U.S.C. §§ 153(46), 251(b).

³47 U.S.C. § 251(e)(2).

On July 2, 1996, the FCC set forth a schedule to phase in implementation of number portability. It directed LECs to provide this service initially on an interim basis (“interim number portability”), and later on a permanent basis (“long-term number portability” or “LNP”). Additionally, the FCC provided for implementation in different geographic areas on a staggered basis: LECs operating in the 100 largest metropolitan statistical areas (MSAs) had to offer LNP throughout those MSAs by December 31, 1998.⁴ The Minneapolis/St. Paul area is among the nation’s 100 largest MSAs.

On May 30, 1997, the Governor signed a bill that would, after December 15, 1997, direct the Commission to not allow USWC to change retail rates except by two means: an AFOR plan, or a determination of USWC’s revenue requirement.⁵

On October 21, 1997, USWC initiated the current docket by requesting Commission’s approval for its proposed AFOR Plan. The proposed plan would restrict USWC’s ability to raise prices above an “Initial Price,” as that term was defined in the plan.

On May 12, 1998, the FCC issued its *Third Report and Order* regarding number portability. The FCC asserted “exclusive jurisdiction” over LNP cost recovery and authorized LECs to recover certain LNP costs through monthly customer fees. However, the FCC granted LECs discretion in imposing those fees:

Beginning February 1, 1999, we will allow but not require rate-of-return and price-cap LECs to recover their carrier-specific costs directly related to providing long-term number portability through a federally tariffed, monthly number portability charge that will apply to end users....⁶

* * *

Incumbent LECs may collect less than the maximum allowable charge, or decline to collect the charge, from some or all of their customers as long as they do so in a reasonable and non-discriminatory manner.⁷

On May 22, 1998, USWC filed Reply Comments and included a Proposed Amended AFOR Plan. The amended plan continued to restrict USWC’s ability to raise prices above an “Initial Price”; however, the amended plan stated that “Initial Price does not include any federally tariffed rates....” The amended plan did not define “federally tariffed rates,” but USWC commented that:

[USWC] believes that any federally *mandated* charges in the form of federally tariffed rates also falls outside the scope and jurisdiction of the AFOR plan, and

⁴In the Matter of Telephone Number Portability, CC Docket No. 95-116, *First Report and Order and Further Notice of Proposed Rulemaking* (July 2, 1996), ¶ 77.

⁵Laws 1997, Chapter 223, codified as amended at Minnesota Statutes § 237.072.

⁶In the Matter of Telephone Number Portability, CC Docket No. 95-116, *Third Report and Order* (May 12, 1999), ¶ 9; see also ¶ 135.

⁷*Id.* ¶ 143.

has inserted language in the Proposed Amended Plan to this effect. Such federally tariffed rates are not “approved rates or prices on file with the Commission” as provided in Minn. Stat. § 237.762.

(Emphasis added.)

In July 1998, USWC implemented LNP in switches in the Minneapolis/St. Paul MSA, and filed tariffs with the FCC to recover LNP costs.

On July 30, 1998, USWC filed a proposed settlement in its AFOR case.

On October 21, 1998, USWC signed an agreement with the Colorado Public Utilities Commission in which USWC appears to forego recovery of \$8 million of LNP costs by either state or federal mechanisms.⁸

The Commission eventually adopted an amended version of USWC’s proposal, which took effect on January 1, 1999.

On January 26, 1999, USWC filed a Streamlined Filing with the FCC to charge subscribers for the cost of LNP. USWC began imposing its proposed LNP charges in March. USWC revised its filing on July 2, and on July 9 the FCC approved the filing.

On August 9, 1999, the Department initiated the current complaint by filing its petition alleging that USWC’s LNP charges on subscribers violated the AFOR Plan.

III. Jurisdiction and Referral for Contested Case Proceedings

The Commission has jurisdiction over this matter pursuant to Minnesota Statutes, chapter 216 and §§ 216A.05, 237.06, 237.075, 237.081 and 237.461. USWC is a telephone company subject to the Commission’s jurisdiction pursuant to § 237.01, subdivision 2. The Commission has jurisdiction over USWC’s AFOR Plan pursuant to Minnesota Statutes § 237.76 *et seq.* The Plan itself states:

From the Plan Effective Date, the Commission will regulate the prices for the price-regulated and flexibly-priced serviced provided by USWC as provided in this Plan.... [Except as otherwise provided,] provisions of Chapter 237 of Minnesota Statutes ... and applicable rules will continue to apply to the provision of services by USWC. Except as provided herein, the Commission retains its authority under section 237.081 to investigate matters other than rate of return and earnings and to issue appropriate orders....

⁸Department Petition, Exhibit 12, In the Matter of the Application of U S WEST Communications, Inc. for Specific Forms of Price Regulation, Colorado Public Utilities Commission Docket No. 97A-540T, Stipulation and Settlement Agreement, p. 12.

AFOR Plan, Section III.A. (January 11, 1999).

USWC argues that the Commission lacks jurisdiction over this matter because the AFOR Plan “was entered into at the state level ... and confers no authority on either the Department or the Commission to interfere with areas in which the FCC has lawfully exercised exclusive federal jurisdiction.” USWC Reply Comments, November 15, 1999, p. 5.

Even assuming that the Department and the Commission lacked the authority to bar USWC from recovering FCC-approved LNP rates, USWC’s assertion still leaves two questions unresolved. First, did *USWC* have the authority to forego its right to recover LNP costs via a separate federal tariff? USWC answered this question when it signed an agreement with the Colorado Public Utilities Commission to waive recovery of \$8 million in LNP costs through both state and federal tariffs.

Second, *did* USWC effectively surrender its right to impose a separate LNP charge during the first two years of its Minnesota AFOR Plan? This matter remains in dispute. USWC emphasizes that the AFOR Plan excludes “federally tariffed rates.” The Department notes that USWC characterized the term “federally tariffed rates” to mean mandated rates, and that the FCC has granted LECs discretion in recovering LNP costs. The Commission finds that this issue warrants further development.

Yet USWC maintains its jurisdictional objection. USWC argues that, even if the complaint raises material issues that need further development, the FCC must do that developing because the FCC has asserted *exclusive* jurisdiction over LNP cost recovery. The FCC stated:

28. ...Section 251(e)(2) states that carriers shall bear the costs of number portability “as determined by the [FCC],” and does not distinguish between costs incurred in connection with intrastate calls and costs incurred in connection with interstate calls. Thus, we conclude that section 251(e)(2) addresses both interstate and intrastate matters and overrides section [15]2(b)’s reservation of authority to the states over intrastate matters.

29. Consequently, we find that section 251(e)(2) authorizes the [FCC] to provide the distribution and recovery mechanism for all the costs of providing long-term number portability. We conclude that an exclusive federal recovery mechanism for long-term number portability will enable the Commission to satisfy most directly its competitive neutrality mandate, and will minimize the administrative and enforcement difficulties that might arise were jurisdiction over long-term number portability provided. Further, such an approach obviates the need for state allocation of the shared costs of the regional databases, a task that would likely be complicated by the database’s multistate nature. Under the exclusively federal number portability cost recovery mechanism, incumbent LECs’ number portability costs will not be subject to jurisdictional separations. Instead, we will allow incumbent LECs to recover their costs pursuant to

requirements we establish in this *Third Report and Order*.⁹

The Minnesota Commission finds that its jurisdiction over USWC's AFOR does not conflict with the FCC's jurisdiction over LNP cost recovery. By acknowledging its jurisdiction over the current complaint, the Minnesota Commission does not challenge USWC's right to recover LNP costs, challenge the FCC's quantification of those costs, create additional administrative and enforcement burdens for the FCC, create a need for interstate cost allocations or jurisdictional separations, or harm competitive neutrality. The Minnesota Commission merely seeks to ascertain whether USWC has, for some period, surrendered its right to receive compensation for LNP costs via a federal tariff that is above and beyond the compensation USWC receives pursuant to its AFOR Plan. Finding USWC's arguments unpersuasive, the Commission will acknowledge its jurisdiction over the current complaint.

Under its rules of practice and procedure, the Commission initiates a contested case proceeding when there are contested material facts and a legal right to a hearing or when the Commission finds that all significant issues in a case have not been resolved to its satisfaction. Minn. Rules 7829.1000. The Commission finds that the issue in this complaint -- whether the AFOR Plan accounts for USWC's recovery of LNP costs during its first two years -- is a mixed question of law and fact, and cannot be resolved on the basis of the record as it now stands. The Commission will therefore refer the case to the Office of Administrative Hearings for contested case proceedings.

IV. Issues to be Addressed

The Commission refers to the Office of Administrative Hearings the question of whether USWC's practice of imposing its LNP charge is in any way inconsistent with its AFOR Plan, and if so, what measures the Commission may take in remedy. As part of the development of this record, the Administrative Law Judge may find it appropriate to address the following issues:

- The extent to which the AFOR proceeding addressed LNP costs.
- Evidence about each party's understanding regarding whether USWC would be able to increase rates to recover LNP costs from customers, above and beyond the rates otherwise authorized in the AFOR Plan, during the AFOR Plan's first two years.
- The meaning of the phrases "federally tariffed rate," "governmental mandate" and "initial price."
- Whether USWC postponed seeking recovery of LNP costs until after the Commission approved its AFOR Plan settlement to avoid attracting attention to the issue of LNP cost recovery.

⁹In the Matter of Telephone Number Portability, CC Docket No. 95-116, *Third Report and Order* (May 12, 1999).

- Whether the Commission may rescind the AFOR Plan in whole or in part for lack of a “meeting of minds,” and if so, the consequences that would result.
- The financial consequences that would result under AFOR Plan Section IV.E.3(c)(iii) if the Commission were to adopt the Department’s position. That section states:

3. Changes After Two Years. After the Plan has been in effect for two years, USWC or other parties may petition the Commission to change the initial prices for price-regulated services to reflect the following:

* * *

c) Substantial financial impacts for investments in telecommunications infrastructure which are made: (i) if the investments, for any 12-month period, exceed 20 percent of the gross plant investments of the company; or (ii) are the result of governmental mandates issued after the Plan Effective Date to construct specific telephone infrastructure, the mandate applies to local telephone companies, USWC would not otherwise be compensated for the cost of such investments, or (iii) are the result of governmental mandates described in (ii) above, but issued before the Plan Effective Date, and the actual financial impact upon USWC exceeds the impact projected before the Plan Effective Date.

The Commission also commends to the Administrative Law Judge’s discretion all other issues of relevance to this case.

V. Procedural Outline

A. Administrative Law Judge

The Administrative Law Judge assigned to this case is Steve M. Mihalchick. His address and telephone number are as follows: Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minnesota 55401-2138; (612) 349-2544.

B. Hearing Procedure

Hearings in this matter will be conducted in accordance with the Administrative Procedure Act, Minn. Stat. §§ 14.57-14.62; the rules of the Office of Administrative Hearings, Minn. Rules, parts 1400.5100 to 1400.8400; and, to the extent that they are not superseded by those rules, the Commission's Rules of Practice and Procedure, Minn. Rules, parts 7829.0100 to 7829.3200. Copies of these rules and statutes may be purchased from the Print Communications Division of the Department of Administration, 117 University Avenue, St. Paul, Minnesota 55155; (651) 297-3000.

Under these rules parties may be represented by counsel, may appear on their own behalf, or may be represented by another person of their choice, unless otherwise prohibited as the unauthorized practice of law. They have the right to present evidence, conduct cross-examination, and make written and oral argument. Under Minn. Rules, part 1400.7000, they may obtain subpoenas to compel the attendance of witnesses and the production of documents.

Any party intending to appear at the hearing must file a notice of appearance (Attachment A) with the Administrative Law Judge within 20 days of the date of this Notice and Order for Hearing. Failure to appear at the hearing may result in facts and issues being resolved against the party who fails to appear.

Parties should bring to the hearing all documents, records, and witnesses necessary to support their positions. They should take note that any material introduced into evidence may become public data unless a party objects and requests relief under Minn. Stat. § 14.60, subd. 2.

Any questions regarding discovery under Minn. Rules, parts 1400.6700 to 1400.6800 or informal disposition under Minn. Rules, part 1400.5900 should be directed to Narda Jones, Assistant Attorney General, 900 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, (612) 282-5720.

The times, dates, and places of public and evidentiary hearings in this matter will be set by order of the Administrative Law Judge after consultation with the Commission and intervening parties.

C. Intervention

Current parties to this complaint are the Department, the SRA and USWC. Other persons wishing to become formal parties to this case shall promptly file petitions to intervene with the Administrative Law Judge. They shall serve copies of such petitions on all current parties and on the Commission. Minn. Rules, part 1400.6200.

D. Prehearing Conference

A prehearing conference will be held in this case on Thursday, February 3 at 1:30 p.m. in the Large Hearing Room, Public Utilities Commission, 121 7th Place East, Suite 350, St. Paul, Minnesota 55101. Persons participating in the prehearing conference should be prepared to discuss time frames, scheduling, discovery procedures, and similar issues.

VI. Application of Ethics in Government Act

The lobbying provisions of the Ethics in Government Act, Minn. Stat. §§ 10A.01 *et seq.*, apply to cases involving ratesetting. Persons appearing in this proceeding may be subject to registration, reporting, and other requirements set forth in that Act. All persons appearing in this case are urged to refer to the Act and to contact the Minnesota Campaign Finance and Public Disclosure Board, telephone number (651) 296-1720, with any questions.

VII. Ex Parte Communications

Restrictions on *ex parte* communications with Commissioners and reporting requirements regarding such communications with Commission staff apply to this proceeding from the date of this Order. Those restrictions and reporting requirements are set forth at Minn. Rules, parts 7845.7300-7845.7400, which all parties are urged to consult.

ORDER

1. A contested case proceeding shall be held on the Department's petition, as set forth above.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (612) 297-4596 (voice), (612) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).

BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
Suite 1700
100 Washington Square
Minneapolis, Minnesota 55401-2138

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
Suite 350
121 Seventh Place East
St. Paul, Minnesota 55101-2147

In the Matter of a Petition by US WEST
Communications, Inc. Requesting Approval
of an Alternative Regulation Plan

MPUC Docket No. P-421/AR-97-1544

OAH Docket No.

NOTICE OF APPEARANCE

Name, Address, and Telephone Number of Administrative Law Judge:

Steve M. Mihalchick, Office of Administrative Hearings, Suite 1700, 100 Washington Square,
Minneapolis, Minnesota 55401-2138; (612) 349-2544.

TO THE ADMINISTRATIVE LAW JUDGE:

You are advised that the party named below will appear at the above hearing.

NAME OF PARTY:

ADDRESS:

TELEPHONE NUMBER:

PARTY'S ATTORNEY OR OTHER REPRESENTATIVE:

OFFICE ADDRESS:

TELEPHONE NUMBER:

SIGNATURE OF PARTY OR ATTORNEY: _____

DATE: _____